No. 508.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952.

UNITED STATES OF AMERICA,
Petitioner,

v.

INTERNATIONAL BUILDING COMPANY,
a Corporation.

PETITION FOR REHEARING
By International Building Company.

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Cases Cited.

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Comes now International Building Company and presents its petition for rehearing on the decision rendered in this cause May 4, 1953, and as grounds and reason therefor respectfully states:

I.

The Opinion, Pages Three and Four, Overrules and Is Contrary to Fundamental Doctrines of Our Jurisprudence as to the Effect of a Consent Judgment and Its Necessary Implications as Announced by This Court in

Thomson v. Wooster, 114 U. S. 104, 110;
Nashville, Chattanooga & St. L. Railway Co. v. United States, 113 U. S. 261, 266, 267;

United States v. Parker, 120 U. S. 89, 95, 96;
Swift & Co. v. United States, 276 U. S. 327, 328;
Pope v. United States, 323 U. S. 1, 12.

The basis of the decisions made in the opinion have all been ruled to the contrary in the above cited cases.

Thomson v. Wooster, 114 U. S. 104, 110, states:

> "A confession of facts properly pleaded dispenses with proof of those facts and is as effective for purposes of the suit as if the facts were proved."

In Nashville, Chattanooga & St. L. Railway Co., supra, where a consent judgment was entered, and the identical defense raised in a subsequent suit that the claim was not litigated or submitted in the previous suit as the defense in the instant case, the Court said in response to such a defense:

> "But the insurmountable difficulty is that the former decree appears to have been rendered by the consent of the parties * * * neither party can deny its effect as a bar of a subsequent suit in any claim included in the decree."

In **United States v. Parker**, 120 U. S. 89, 95, 96, with reference to consent judgments and their implications, this Court said:

> "* * * must be understood in the absence of anything to the contrary expressed in the agreement and contained in the judgment itself, to amount to such an **adjustment of the merits** of the controversy by the parties themselves * * *. This is equivalent to a judgment that the plaintiff had no cause of action because the defense of the defendant was found to be sufficient in law and true in fact. Upon general principles of common law, regulating practice and procedure in Courts of Justice, it must be held that the judgment

here in question is final in its form and nature and must have the effect of a bar to the present action * * *." (Emphasis ours.)

In **Swift & Co. v. United States**, 276 U. S. 311, 327, 328, wherein a consent judgment was rendered without a hearing, where no briefs were filed, and there was no argument, and a stipulation of judgment was filed by the parties, and wherein subsequently the same defense was entered as in the instant case, this Court held in response to such a defense:

> "The argument ignores * * * the legal implications of a consent decree."

The Court further said as to the defense that the judgment was a general one and not specific (as the Court in effect stated in its opinion in the instant case):

> "The paragraphs if standing alone to the objection * * * but they do not stand alone, they are to be read in connection with other paragraphs of the decree and **with the allegations of the bill. When so read all uncertainties are removed.**" (Emphasis ours.)

In **Pope v. United States**, supra, this Court said with reference to consent judgments:

> "It is a judicial function and an exercise of the judicial power to render judgment on consent. A judgment upon consent is a judicial act * * *. It is likewise a judicial act to give judgment on a legal obligation which the court finds to be established by stipulated facts."

Obviously this Court, although not mentioning any of the above cases in its opinion, did not intend to overrule them and rule contrary thereto and thereby upset one of the fundamental principles of our jurisprudence as to res adjudicata or collateral estoppel on a consent judgment.

Under the ruling in the opinion rendered the Court has set up a precedent that will have a most tremendous impact on innumerable cases that have heretofore been considered adjudicated for all time, including tax cases, anti-trust cases, and especially civil cases involving injunctions. Under the ruling in this opinion, **Swift & Co.** could if necessary take action and ignore the judgment in its case cited above and say that the issues were never presented to the Court for determination (as is held in the opinion in the instant case), and this Court, to be consistent with the instant opinion, would be compelled to assent or overrule the law laid down in the present opinion. The Court has failed to take into consideration the implications of a consent judgment, as held in the foregoing previous opinions.

II.

The Court Has Ruled as to Form and Adjudged the Case Thereon Rather Than Substance.

This Court has in numerous instances, and especially tax cases, held that it looks to substance rather than to form and that technical consideration and legal paraphernalia could not obscure the basic issue. Justice Douglas, who wrote the opinion in the instant case, so held as above noted in **Helvering v. Clifford**, 309 U. S. 331, 334.

III.

Russell v. Place, 94 U. S. 606, 608, Cited in the Opinion, Cannot Apply Because the Judgment in That Case Was Not a Consent Judgment With Its Consequent Implications and the Russell Case Further Cannot Apply Under the Previous Rulings of This Court in the Swift & Co. Case, Supra, and the Other Cases Cited Above.

Russell v. Place, 94 U. S. 606, 608, cited in the opinion, was not a consent judgment case on the merits, and there-

fore that case has evidently been cited inadvertently by the Court. That case held that there must be a showing in the record or by extrinsic evidence "that the precise question was raised or determined in the former suit." Under the stipulations filed in the Tax Court, the consent judgment on the merits was entered by the Tax Court and it is a part of the record which facts the Court has obviously overlooked. Therefore the statement in the Court's opinion in the instant case that "there is no showing either in the record or by extrinsic evidence * * * that the issues raised by the pleadings were submitted, etc.," finds no support in the record. In consent judgments by confession as in the instant case, there is no need for extrinsic evidence over a single issue in the case that has been confessed. The Court's opinion in this respect is contrary to and overrules the decision in the Swift Case, supra, and the other cases cited above.

IV.

The Opinion of the Court, Page Three, That There Is No Showing That the Issues Were Submitted to the Tax Court Is Contrary to the Record.

The stipulation of facts filed in the District Court below (R. 46 f) shows that the United States admits that the Tax Court entered its decision and the United States under the law cannot deny its own admission that the matter was submitted to the Tax Court for judgment.

The Court Has Obviously Considered Unsworn Evidence as a Part of the Record.

The court has obviously considered unsworn evidence as a part of the record (a letter from the Clerk of Tax Court) attached to the United States reply brief filed with this court, as a part of the record, which of course it is not.

The place to introduce such evidence is the Trial Court, and even if offered there would not be admissible over objection for two reasons, (one) that it is unsworn evidence and not subject to cross-examination, and (two) that it is contrary to the admission in the stipulation of facts of the party seeking to introduce it (R. 26, Stipulation of Fact f).

VI.

The Court Has Written Its Opinion as If There Were More Than One Issue in the Cases Before the Tax Court.

The opinion of the court (page 3, last paragraph) uses the phrase, "* * * that the issues raised by the pleadings were submitted * * *"; such a statement, we respectfully submit, is contrary to the Record. On page 44 of the R. 18 (a) and on page 45 of the Record (c), which are part of the stipulation of facts filed in the District Court, the United States **admitted that the basis of depreciation was the only single issue in the case before the Tax Court** and that it was the same identical issue in the instant case. We respectfully submit, therefore, that the record does not warrant the use of the word "issues" as plural in the opinion and that thereby the Court has erred.

VII.

The Fact That the Upholding of a Consent Judgment as Collateral Estoppel in This Case Might Embarrass the Commissioner of Internal Revenue in His Administration of the Tax Laws Is No Ground for Not Upholding Collateral Estoppel.

This Court in several cases has announced and particularly in Tait v. Western Maryland Railway Co., 289 U. S. 620, 624, wherein this same embarrassment as to the administration of the law was pleaded as a defense, the court stated:

"We are not persuaded that the operation of the principle of the thing adjudged in tax cases will, as petitioner insists, produce serious inequalities, or result in great confusion; but any adverse consequence in the administration of the law furnishes no sufficient reason for the abandonment of a rule founded in sound policy, to the enforcement of which suitors are in justice entitled."

CONCLUSION.

For the reasons assigned under the rulings of this Court, as noted above, your petitioner respectfully submits that this Court should apply the same rules and considerations as announced in the above cited cases in the same manner as it has heretofore applied them to litigants against the United States, and thereby preserve a rule founded on sound public policy to which taxpayers as well as the United States are in justice entitled to; your petitioner for a rehearing earnestly requests each Justice of this court to reconsider this case and the opinion rendered thereon and prays that the Court set aside its opinion and judgment and grant a rehearing.

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Certification.

Counsel for International Building Company hereby certify that the above and foregoing petition for rehearing is presented and filed in good faith on the merits of the cause and not for purposes of delay.

Irl B. Rosenblum,
Malcolm I. Frank.